# MALAYSIAN REPORTS

## HAGEMEYER TRADING CO. (MALAYSIA) SDN. BHD. v. GIBSON TRADING CO.

**[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 7, 1977 and April 7, 1978]**

**[Penang — Federal Court Civil Appeal No. 147 of 1977]**

*Practice and Procedure — Distinct and separate courses of action joined together — Whether doctrine of election applies — Whether judgment against one defendant bar to action against the other — Time within which to appeal — R.S.C. 1957, O. 14 r. 5, O. 18 rr. 1, 8 & 9, O. 54 r. 21.*

In this case the appellant sued the respondent for the sum of $110,000 for goods sold and delivered. The respondent had made representations that the amount due had been paid to a salesman of the appellants. The appellant obtained leave to amend the writ to include the salesman as second defendant. The salesman did not appear and the appellant signed judgment against him. The respondent then filed his defence, claiming that the sum of $110,000 had been paid in full to the salesman, the second defendant. The appellant applied for summary judgment under Order 14 and the Senior Assistant Registrar held that the respondent had no defence to the claim as the payments if made were in breach of the contract, which required payments to be by cross-cheques. On appeal, before the judge the defence of accord and satisfaction was abandoned and the respondent argued that in view of the judgment entered by the appellant against the salesman, the appellant was barred from proceeding against the respondent. The learned judge held that the doctrine of election applied to the case and he accordingly set aside the judgment entered against the respondent. The appellant appealed to the Federal Court.

**Held,** allowing the appeal: (1) the principle of election applies only to a case of joint liability in the relationship of principal and agent. In this case there were two distinct and separate causes of action and therefore the question of election did not arise;

(2) the notice of appeal in this case was filed more than the five days allowed for the taking out of the appeal and was therefore out of time;

(3) the case should be remitted back to the judge to consider the application under Order 14 on its merits.

*Cases referred to:-*

(1) *Cross & Co.* v. *Matthews & Wallace* (1904-1905) 91 L.T.R. 500.

(2) *Morel Brothers & Co. Ltd.* v. *Earl of Westmoreland* [1904] A.C. 11.

(3) *Scarf* v. *Jardine* (1882) 7 App. Cas. 345.

(4) *Debenham's Limited* v. *Perkins* (1925) 133 L.T. 252.

(5) *Firm of RMKRM* v. *Firm of MRMVL* [1926] A.C. 761.

(6) *Kendall* v. *Hamilton* 4 App. Cas. 504, 514.

(7) *Priestley* v. *Fernie* (1865) 3 H. & C. 977.

(8) *Isaacs & Sons* v. *Salbstein* [1916] 2 K.B. 139.

(9) *Lechmere* v. *Fletcher* 1 Cr. & M. 623 at p. 635.

(10) *Gooi Seang Tuck* v. *Tan Peng Loon & Anor.* [1959] M.L.J. 153.

FEDERAL COURT.

*Lim Peng Siew* for the appellant.

*Gan Teck Chee* for the respondent.

**Chang Min Tat F.J.** (delivering the judgment of the Court): This is an appeal from the decision of the learned judge in Penang allowing an appeal from an Order 14 judgment given by the Senior Assistant Registrar. The Senior Assistant Registrar thought that the respondent had no defence to the claim of the appellant for goods sold and delivered. The defence advanced was that the respondent had paid for the price of the said goods to the salesman of the appellant who dealt with it but the Senior Assistant Registrar found on the evidence of the delivery orders and invoices that such payments were, if made, made in breach of the conditions of sale, not being by crossed cheques as specified, and in the light of certain authorities, held that this defence did not raise any triable issue. At the appeal before the learned judge, the defence of accord and satisfaction was abandoned or not proceeded with, and a new argument addressed to the judge that in view of the judgment entered by the appellant against this salesman whom it had later joined in the same action, the appellant was barred from proceeding against the respondent. The learned judge agreed with the respondent that the doctrine of election applied to this case and accordingly set aside the judgment entered against the respondent.

It is now necessary to refer to the pleadings in some detail. The appellant first sued the respondent in the sum of $110,000 for goods sold and delivered. Subsequent to the writ but before the defence of the respondent was delivered, and very probably as the result of the respondent's representations of payments to the salesman, one Geh Thuan Seng by name, the appellant sought and obtained leave to amend the writ and the statement of claim by including Geh Thuan Seng as the 2nd defendant. In the amended statement of claim, the appellant averred additionally that the respondent had caused loss to it in the sum claimed by making payments other than by crossed cheques in breach of an express term of sale and by failing to demand proper and valid receipts. In the alternative, the appellant charged Geh Thuan Seng with misappropriation and embezzlement of the proceeds of sale. It claimed $110,000 from the respondent and in the alternative, the same sum against Geh Thuan Seng for money had and received.

As for the course of events, the salesman Geh predictably did not appear and did not deliver any defence. The appellant promptly signed judgment against him.

Then after judgment was signed, the respondent delivered its defence. It claimed to have paid the sum of $110,000 in full to the 2nd defendant. It also denied the existence of a term for payment by crossed cheques. Later, in an affidavit filed to oppose the Order 14 application, it exhibited two of the appellant's invoices, which bore, on its allegations, a written acknowledgment by the 2nd defendant of the receipt of the sums mentioned therein less certain discounts. The first invoice was dated May 26, 1974 for $547.20. It was superinscribed with an acknowledgment of the receipt of $536.26 on August 5, 1974. The second was for $503. It was dated February 8, 1974. The acknowledgment and the date are too indistinct on the Xeroxed copy in the Record of Appeal to make out. The amounts of the alleged payments are relatively insignificant, but the purported acknowledgments were relied upon as proving or tending to prove the truth of the respondent's averment of full payment. But if full payment had been made and acknowledgments obtained, it should have been the easiest matter for Mr. Ho Khoon Gniap @ Ho Koon Yet, who made the affidavit and who was one of the original two

partners and at the time of making the affidavit the sole proprietor of the respondent firm, to exhibit all the receipts for the payments.

As for the existence or otherwise of a term for payment by crossed cheques, the appellant's invoices which it exhibited and which were similar to the two exhibited by the respondent, clearly bear a note to the effect that no receipt on the bill is valid and a further note that a separate receipt signed by the firm will be issued on payment. Further the appellant's delivery orders which it had and which all bore the acknowledgment of the respondent of receipt and of which presumably copies had, in the normal course of business, been given to the respondent, are endorsed with the note: "IMPORTANT: Our salesmen have no authority to accept payment (other than by crossed cheques payable to the Company). A receipt on this bill alone is not valid and will not bind the Company. The Company will issue a separate receipt on payment."

On this evidence, the Senior Assistant Registrar not surprisingly found the existence of an express term for payment by crossed cheques. If this requirement for payment by crossed cheques is denied as an express term, it could not be gainsaid that the respondent and other customers of the appellant company had been warned against payment to salesmen other than by crossed cheques and that the appellant expressly refused to be bound by any payment made in breach of this requirement.

There is exhibited to the affidavit of the branch manager of the appellant company in Penang an extract of the business transactions between the appellant and the respondent. The balance as at July 31, 1974 (corrected from the date July 31, 1976 as shown, which was obviously an error of typing) was a debit one of $4,955.70. Between August 1, 1974 and August 18, 1975, various other goods were sold and delivered and several payments were made by the respondent. There were 20 such payments, all by cheques amounting in all to some $40,000. There was not a single cash payment. The net balance due from the respondent as at August 18, 1975 was $110,000.

It is to be commented that the 2 payments of which some sort of proof was offered by the respondent, if the ban against the hearsay rule of evidence is for the moment glossed over, had relevance only to the net balance as at July 31, 1974, being beyond the period of the transactions shown. Unfortunately, however, the appellant had not anywhere asserted whether it had adopted the commercial practice of rendering monthly or other periodic statements of accounts, so that it could not be established with any certainty when if ever before action was started, the respondent had claimed to have paid cash totalling $110,000 to and through the salesman.

But whatever one may think of these alleged payments in cash to and through the salesman, a court of law will nevertheless have to give effect to the contention of the respondent, if it is well-founded in law.

The learned judge dealt with the contention of the respondent in this way. After noting that the cause of action against the respondent was for goods sold and delivered and that that against the second defendant was, to quote, "the misappropriation of his employer's money," in other words, after noting that the causes of action were different, he held that the pleadings of the appellant for relief in the alternative were fatal to its case. Again, to quote:

"It is an established principle of law that when claims against two persons are in the alternative, i.e. relief is claimed against one and in the alternative, relief is claimed against the other, then, if judgment is taken against one of them, that is conclusive and irrevocable election and a ban to further proceedings against the other. In this case, notwithstanding that the action is founded on alternative causes of action, yet the prayer asks for relief in the alternative and a plaintiff cannot have both judgments when they are prayed for in the alternative."

This statement of the law was said to have been clearly enunciated in the case of *Cross & Co.* v. *Matthews & Wallace*[1] and especially in the case of *Morel Brothers & Co. Ltd.* v. *Earl of Westmoreland.*[2]

The following passage said to be from the judgment of the Earl of Halsbury L.C. at page 13 was quoted:

"If the claim is against two defendants, as alternatively liable and judgment is signed against one, this rule (Order XIV, rule 5) does not enable the plaintiff to proceed against the other and the doctrine of election established by *Scarf* v. *Jardine*[3] applies."

As a matter of fact, that particular passage was taken from the Yearly Practice of the Supreme Court, which the learned Lord Chancellor in his speech approved as accurately stating the law.

With the greatest of respect, it seems to us that when the learned judge paraphrased the clause "if the claim is against two defendants as alternatively liable" in the passage quoted by the Earl of Halsbury into "when claims against two persons are in the alternative, i.e. relief is claimed against one and in the alternative relief is claimed against the other", he led himself into a certain confusion of thought. Not only did he mistake the shadow for the substance, but he had also failed to distinguish the case of a claim in which two defendants are alternatively liable or jointly liable in the alternative and one of two or more causes of action.

He thought the doctrine of election applied to the case. It is therefore necessary to understand what it exactly means. As explained by Scrutton L.J. thus, in *Debenham's Limited* v. *Perkins*[4] at pages 254-255:

"When an agent acts for a disclosed principal, it may be that the agent makes himself or herself personally liable as well as the principal. But in such a case the person with whom the contract is made may not get judgment against both. He may get judgment against the principal or he may get judgment against the agent who is liable as principal, but once he has got judgment against either the principal or the agent who has the liability of the principal, he cannot then proceed against the other party who might be liable on the contract if proceedings had been taken against him or her first. This is sometimes explained by the doctrine of election and sometimes by the doctrine that when one has merged a contract in a judgment, one can have only one judgment, and, having merged the contract in the judgment, one cannot use the contract to get a second judgment. . . ."

Lord Atkinson in *Firm of RMKRM* v. *Firm of MRMVL*[5] at page 770 said very much the same thing:

"The two judgments which were signed in suits No. 120 and No. 550 were both based on the same cause of action, one directed against the agent of a firm and the other against

the firm itself, and cannot in law co-exist in valid and effective force. In *Kendall* v. *Hamilton*[6] the Lord Chancellor (Earl Cairns) stated with fullness and characteristic accuracy the law upon this point. He said: 'Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of *Priestly* v. *Fernie*[7] may be mentioned.'

The reasons why this must be the case are, their Lordships think, obvious. It would be clearly contrary to every principle if a creditor who has seen and known and dealt with and given credit to the agent should be driven to sue the principal if he does not wish to sue him; on the other hand, it would be equally contrary to justice that the creditor, on discovering the principal who really has had the benefit of the loan, should be prevented from suing him if he wished to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract and no intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, then the agent would have a right of action for indemnity against his principal, while if the principal was liable also to be sued he would be vexed with a double action. Further, if actions could be brought and judgments recovered against the agent and afterwards the principal, there would be two judgments in existence for the same debt or cause of action. They might not necessarily be for the same amounts, and there might be recoveries had or liens and charges created by means of both, and there would be no record on the face of the judgments, or any means short of a fresh proceeding, of showing that the two judgments were really for the same debt or cause of action, and that satisfaction of one was or would be satisfaction of **both.**"

In *Morel's* case, the plaintiffs as supplier of goods ordered by the Countess of Westmoreland sued the Earl and his wife for the cost of the goods. The Earl was sued on the basis of his liability for necessaries supplied to his wife. The decision of the Court of Appeal on the grounds, *inter alia,* that there was no evidence of a joint liability in the husband and wife and that having signed judgment against the wife, the plaintiffs could not recover against the husband and that Order XIV rule 5 did not apply where the right of action could only be in the alternative against one or the other defendant was upheld by the House of Lords on the same grounds.

The case of *Close & Co.* v. *Matthews & Wallace* referred to in the extract from the Yearly Practice was a case in which goods were sold and delivered to the two defendants. Judgment was entered against Matthews but at the trial of the claim against Wallace, it was found that Matthews had throughout acted as agent for Wallace, and the County Court entered judgment against Wallace. This judgment was set aside on appeal by the Court of Appeal which held that the judgment against Matthews was an election on the part of the plaintiff to accept the liability of the agent.

In *Scarf* v. *Jardine, supra,* at page 360, it was held that where principal and agent were both liable, the right of the third party to sue the principal was inconsistent with his right to sue the agent. The supplier could have sued the new firm or at his option the partner whose retirement he had no notice of, but he could not sue both together. The third party may lose his right to sue one by an unequivocal election to sue the other: *Firm of RMKRM* v. *Firm of MRMVL, supra.*

It is therefore reasonably clear that the principle of election applies only to a case of joint liability in the relationship of principal and agent.

Counsel for the appellant relies on *Debenham's Ltd.* v. *Perkins, supra* and seeks on the authority of that case to submit that the principal of election does not apply to a case of separate causes of action. It is similarly a case of supply of goods to a wife, but on the fact that the supply was spread over 2 periods of time divided by the wife's separation from the husband, the Divisional Court of the King's Bench had no difficulty in coming to the decision that there were two distinct and separate causes of action: a cause of action against the wife who was personally liable and a cause of action against the husband, supposed to be acting by the agency of the wife, for different items at different times, resulting in claims of different amounts. It was held that suing the wife for judgment on the whole and obtaining judgment on part of the debt was not an election from suing the husband for that part of the debt incurred by the wife as his agent.

Insofar as Order 14 rule 5 is concerned, we agree that in the case of a joint liability, the rule has no application and where a plaintiff had clearly elected to accept the liability of one contractor for that of the other, he is debarred from proceeding against the other. But on the facts of this case, the 2nd defendant was never at any time the agent of the respondent. He was for the sale the agent of the appellant. The claim of the appellant against the respondent was in contract. In respect of this contract, the respondent was solely liable for the payment. There was no joint liability with another, least of all with the 2nd defendant. Neither was it the case of the respondent constituting the 2nd defendants as his agent or conduit-pipe for the payment of the money it claimed to have paid to the appellant. There never was any claim of such agency. The respondent had all the time claimed to have paid the money to the 2nd defendant as the agent of the appellant, though in direct violation of what it was expressly required to do. If the 2nd defendant had received the money, he obviously had no authority to do so. The cause of action of the appellant against the 2nd defendant was, in the finding of the learned judge, misappropriation of his employer's money and in the statement of claim, for money had and received. The cause of action against the 2nd defendant was clearly distinct and separate from that against the respondent.

The *cri de coeur* of counsel for the appellant is that in the circumstances the use of the word "alternative" is a mistake, an unfortunate and ill-considered error which should not be allowed to frustrate the course of justice. He pleads that despite the use of this word, the case, on the facts, is not one of joint liability and submits that if the respondent had given the 2nd defendant any money for onward transmission to the appellant, the contract of payment by both of them was several and not joint and the appellant might in the circumstances and at its option, join both of them in the same action and that a judgment against one is no bar to the action against the other. It would of course have been so much more convenient, not the least to the appellant, as it must be apparent now, if the appellant had refrained from joining in the salesman and taking judgment against him and rather

had left it to the respondent to establish the fact that it had paid the salesman and to submit on the law the effect of such payments, if found to have been made, in the face of the express requests not to pay cash, as discharging its liability.

But there appears to be some validity for the contention of the appellant. In *Isaacs & Sons* v. *Salbstein,*[8] default judgment in a writ against "Salbstein Brothers" for £20 for the price of lemon, served on one Julius Salbstein was held to be no bar to a subsequent action against H. Salbstein as agent for his wife. Per Lush J. in the Divisional Court at page 143:

"There is . . . no foundation whatever for the contention that because *A* recovers a judgment against *B*, who in truth never was a party to the contract at all, he cannot afterwards recover judgment on that contract against *C*, who was the real contracting party. Where judgment is recovered on a simple contract, that contract no doubt merges in the contract of higher degree which is evidenced by the judgment and which is a contract of record. But there is no ground for saying that a contract between *A* and *B*, although it is a contract of record, merges a contract between *A* and *Z*. They are two different contracts and therefore give rise to two different causes of action."

At pages 151-2, after agreeing with the application of the doctrine of election to cases of joint liability, Swinfen Eady L.J. held that where the obligation binds two or more persons severally, a judgment against one is no bar to an action against the other. He first quoted from Bayley B. in *Lechmere* v. *Fletcher*[9] at page 635 that the law is as thus stated:

"There are many cases in the books as to joint and several bonds, from which it appears, that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other; unless indeed the judgment has been satisfied: but so long as any part of the demand remains due, you are at liberty to sue the other, notwithstanding you have obtained judgment against one. This, I think, establishes the principle that where there is a joint obligation and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other."

He then went on to say:

"If therefore, where the obligations are several, a judgment in an action against one person is no bar to an action against another I see no ground upon which it can be maintained that an action brought in error against a fictitious person or against a person not under any liability is a bar to an action against the person alleged to be really liable. The cause of action is not the same."

In our view and with respect, once it is recognised, as the learned judge did recognise here, that there are clearly shown to be two distinct and separate causes of action, the question of election does not arise nor does Order 14 rule 5. It is the case of the application of Order 18 rule 1, which reads as follows:

"1. Subject to the following Rules of this Order the plaintiff may unite in the same action several causes of action; but if it appear to the court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof."

If any complaint is entertained of wrongful joinder, the remedy is provided in rules 8 and 9 for separation and exclusion.

It follows that the use of the words "in the alternative" has no substantial or any bearing on the matter and that signing judgment against the 2nd defendant for the full sum claimed is no insuperable or any difficulty to the appellant proceeding against the respondent for the same sum, provided always that in no instance would the appellant be able to recover more than the sum claimed as due from either or both of the defendants. This is clearly so on an analogy, the obvious one to make, with the vicarious liability of the master for the tort of his servant. The causes of action of the third party are separate against them and if the tort is proved, the servant is condemned in damages and liable to pay as is the master but in no case could the third party recover more than the damages awarded.

The appeal must be allowed.

The appellant makes a further contention that the appeal to the learned judge from the Senior Assistant Registrar is incompetent for failure to comply with Order 54 rule 21. The contention is not without substance. The learned Judge however thought that from the facts of the case it could not be argued that the respondent's objections were tardy or it was guilty of laches and neglect in processing the appeal. But the facts of the case, as mentioned by him, are that the Senior Assistant Registrar's decision was given on October 14, 1976 and the notice of appeal was served on the appellant's solicitors on October 29, 1976. It was heard on November 15, 1976. This is considerably more than the 5 days allowed not merely for the taking out of the appeal but also for the return date of the summons. In *Gooi Seang Tuck* v. *Tan Peng Loon & Anor.*,[10] Rigby J. thought

"As a matter of practice, however, it is as well that advocates and solicitors should note that the primary responsibility rests with them to ensure that the notice of appeal in such matters should not only be taken out but also be made returnable within the period of five days. I think the most suitable course for Counsel to ensure that the notice of appeal is returnable within the period of five days would be to request the Registrar to include it in the List (if need be, only for mention) for one or other of the days for the hearing of Chamber matters, namely, Mondays or Fridays."

With respect, we agree. Where there is only one chamber day a week, the difficulty can be got over by submitting the summons to the judge within the time specified for him to adjourn the hearing to a more convenient date. There is also power within the rule itself for the Registrar to extend the time.

This leaves the question of what is to be done with the Order 14 application, the subject-matter of the appeal. The learned judge did not deal with the substantive application in the alternative and this court is denied his considered views and indeed the submissions and arguments of counsel on both sides on whether the question of payment to the salesman, taken as a fact for the purpose of the application, did or did not in the presence of the express words in the invoices and delivery orders raise any triable issue. In view of this, we propose the order that the case be remitted to the learned judge for him to consider the Order 14 application on its merits and the contention of the respondent that there are triable issues.

The respondent will pay the costs of the appeal. Costs in the High Court will follow the event.

*Appeal allowed.*

Solicitors: *Lim Huck Aik & Co.; Gan Teik Chee.*